Petition), the District Court approved the settlement and rejected Schiff's conflict and other arguments.[12]

Similarly, on appeal, the Ninth Circuit observed, "[a]t oral argument, Schiff contended the conflict of interest necessarily manifested earlier [than the settlement phase], but, despite repeated questioning, provided no concrete examples."[13]

Finally, Schiff cites two Supreme Court decisions (*Ortiz* and *Amchem*) in a frivolous effort to pique the Court's interest that there may be a question of potential constitutional or national significance. Those cases are wholly dissimilar, however, and do not remotely apply to the unique circumstances of this case. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), involved a serious conflict of counsel who had already negotiated a prior, separate

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[12] Schiff's counsel unjustifiably attacks the District Court judge as merely "rubber-stamping" the settlement, and calls the federal judiciary, among other things, "lazy," and a "moribund, inactive judiciary" that gives "superficial review and blind reliance" to settlements, and asserts that the judiciary must now ignore statutes passed by Congress and take matters into their own hands. Putting aside that Mr. Beatie's comments are an affront to a well-respected senior District Judge who very closely supervised this four-year litigation, and scrutinized the settlement, his railings against the federal judiciary are unfounded, and, in any event, are not a reason to grant certiorari in this case.

[13] The Ninth Circuit's holding that, based on the record, Schiff had not shown that any actual conflict existed is further made clear by its later statement that, "[a]ssuming without deciding that *Lobatz* permits discovery where, as here, the allegation is not that the class counsel and the class representatives colluded with the defendants but that they labored under a conflict of interest, for the reasons noted in Part I above, Schiff has failed to make the requisite foundational showing." (7a.) Thus, Beatie's contention that "the Ninth Circuit recognized that a conflict existed," and that it "held that a 'small' conflict could continue uncured" (Pet. at 5) blatantly mischaracterizes the record.

settlement of 45,000 pending claims, payment of which was contingent on a successful global settlement, including settlement of future claims not yet made or identifiable. *Id.*, at 852-53. Here, unlike *Ortiz*, counsel did not reach any settlement of some claims that could incentivize them to "sell out" the remainder of the claims – especially future claims on behalf of people who are unidentifiable (issues simply not present here) – on the cheap. *Amchem Prods. v. Windsor*, 521 U.S. 591, 625-26 (1997), involved a single, settlement-only class in a massive asbestos case, where the parties filed a complaint, answer and settlement simultaneously, *i.e.*, never intending to litigate the case, and the settlement covered all current and future (unknowable) asbestos-related claims. *Id.* at 624. The Court in *Amchem* stated that "the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Id.* at 626. These are not the circumstances of this case. Unlike *Amchem*, the class representatives here assert the same class claims they seek to represent (*i.e.*, they *are* part of the class they seek to represent), and possess the same interest and suffered the same injury as all of the class members – and Schiff was unable to point to any evidence whatsoever that the settlement was collusive. *Cf. id.* at 625-26.

CONCLUSION

For the foregoing reasons, the Petition should be denied. The tens of thousands of members of both the *Thurber* and *Dusek* classes, who have been waiting for

redress for over two years since the District Court's final approval of the settlement, pending resolution of Schiff's lone objection and concomitant appeals, should receive payment of the proceeds of the settlement.

November 9, 2005

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NORMA J. THURBER, et al., On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. MATTEL, INC., et al., Defendants.	No. CV-99-10368-MRP (CWx) CLASS ACTION ORDER APPOINTING THE MATTEL PLAINTIFFS' GROUP AS LEAD PLAINTIFF PURSUANT TO §21D(a)(3)(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AND APPROVING LEAD PLAINTIFF'S CHOICE OF COUNSEL DATE: January 10, 2000 TIME: 10:00 a.m. COURTROOM: The Honorable Mariana R. Pfaelzer

(Filed Jan. 11, 2000)

Having considered movants' Motion to Appoint the Mattel Plaintiffs' Group as Lead Plaintiff Pursuant to §21D(a)(3)(B) of the Securities Exchange Act of 1934 and to Approve Lead Plaintiff's Choice of Counsel (the "Motion"), and good cause appearing therefor, the Court ORDERS as follows:

1. The Motion is GRANTED;

2. Pursuant to §21D(a)(3)(B) of the Securities Exchange Act of 1934, 15 U.S.C. §78u-4(a)(3)(B), the Mattel Plaintiffs' Group is appointed Lead Plaintiff for the class; and

3. Pursuant to §21D(a)(3)(B)(V), Lead Plaintiff's selection of counsel is approved. The law firms of Milberg Weiss Bershad Hynes & Lerach LLP, Weiss & Yourman, Wolf Popper LLP, Scott & Scott, LLC and Berger & Montague are appointed as Lead Counsel Executive Committee for the class, with Milberg Weiss appointed as Chairman of the Executive Committee. Wolf Popper LLP will have primary responsibility for prosecuting the §14(a) claim.

* * *

ORDER

DATED: Jan. 11, 2000

MARIANA R. PFAELZER
THE HONORABLE
MARIANA R. PFAELZER
UNITED STATES
DISTRICT JUDGE

No. 05-546

IN THE

Supreme Court of the United States

MEL SCHIFF,

Petitioner,

—v.—

FRANK A. DUSEK, On behalf of himself and all others similarly situated; HUGH DELOZIER, Dr. and Mrs.; STATE STREET BANK; BIRMINGHAM RETIREMENT & RELIEF FUND,

Respondents,

MATTEL INC.; JILL E. BARAD; HARRY J. PEARCE; MICHAEL PERIK; HAROLD BROWN; JOSEPH C. GANDOLFO; TULLY M. FRIEDMAN; NED MANSOUR; RONALD M. LOEB; ANDREA RICH; WILLIAM D. ROLLNICK; PLEASANT T. ROWLAND; CHRISTOPHER A. SINCLAIR; JOHN L. VOGELSTEIN; BRUCE L. STEIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

"Petitioner", by his counsel, respectfully submits this reply brief in further support of his petition for a writ of certiorari (the "Petition") to review the decision of the United States Court of Appeals for the Ninth Circuit. Plaintiffs-Respondents ("Respondents") argue that this Court should decline review because we have not filed a traditional petition; have not satisfied a traditional test for certiorari; have done no more than make personal attacks on the Milberg weiss firm (the "Milberg firm" or "Milberg"), class counsel; and have failed to present an issue that implicates "significant, far-reaching, constitutional or national concerns." Brief in Opposition at 2. We view the constitutional requirement for independent class counsel free of conflicts differently.

The methods employed by class counsel and sanctioned by the lower courts in many cases demand this Court's attention. Treating lead plaintiffs and lead counsel as if they were separate and distinct, Respondents imply that the *Dusek* class and the *Thurber* class had separate, independent counsel.[1] *See* Brief in Opposition at 2, 4-5, 7. Not so. The indisputable fact: two distinct

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[1] As evidence of independent representation Respondents make "factual" assertions; but they are not factual, are irrelevant, or are unsupported by the record. For example, Respondents include a laundry list of work done by the Wolf Popper firm in the *Dusek* case. Brief in Opposition at n. 3. The Petition does not seek review of Wolf Popper's work on the *Dusek* case, but whether its representation of the *Dusek* class was independent and free of conflict. Respondents also claim that Wolf Popper "had every expectation that its fee would increase the more it was able to obtain in recovery for the *Dusek* class." Brief in Opposition at n. 9. While Wolf Popper may have harbored those expectations, nothing in the record below links Wolf Popper's fees and its efforts. To the contrary, the district court made no award to Wolf Popper but, instead, a lump sum fee award to all counsel based on the total settlement fund.

class action lawsuits had the same lead plaintiffs and lead counsel. In a single order the district court made the following appointments for both classes:

> [T]he Mattel Plaintiffs' Group is appointed Lead Plaintiff for the class . . . .[2]
>
> * * *
>
> The law firms of Milberg Weiss Bershad Hynes & Lerach LLP, Weiss & Yourman, Wolf Popper LLP, Scott & Scott LLC and Berger & Montague are appointed as Lead Counsel Executive Committee for the class, with Milberg Weiss appointed as Chairman of the Executive Committee. Wolf Popper LLP will have primary responsibility for prosecuting the §14(a) [*Dusek*] claim.

Respondents argue that different responsibilities among the members of the Executive Committee equal independence for constitutional purposes. But the Executive Committee is no different than a law firm; and when two lawyers within one firm represent different clients with conflicting interests, "the disqualification extends vicariously to the entire firm [here, to the entire Executive Committee]." *Flatt v. Superior Court*, 9 Cal. 4th 275, 283, 885 P.2d 950, 954, 36 Cal. Rptr. 2d 537, 541 (Cal. 1994).

In Arkansas a class action filed in January 2005 seeks very large damages against the accounting firm KPMG LLP ("KPMG"), and other defendants. *Becnel v. KPMG LLP*, Index No. 05-CV-6015 (W.D. Ark.). While this

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[2] At that time the Mattel Plaintiffs' Group included Mollie and Hugh DeLozier, Glenn and Julie Bauer, State Street Bank, and the Birmingham Retirement & Relief Fund ("Birmingham"). Subsequently, the Bauers and State Street Bank dropped out of the Mattel Plaintiffs' Group and, when the two classes were certified, the DeLoziers and Birmingham were appointed lead plaintiffs for both.

action was pending, the Milberg firm secretly negotiated a class action settlement with KPMG and another defendant. Simultaneously, Milberg then filed its case, sought class certification, and moved for preliminary settlement approval in New Jersey.[3] Despite the lack of any truly adversarial proceedings to protect the interests of the absent class members, the New Jersey district court certified a class for settlement purposes, appointed the Milberg firm class counsel, and granted preliminary approval of the settlement. The case was settled by privately retained "mediators", not as a result of judicial supervision and adversarial discovery.[4] If the settlement were less than the real value of the case, how could any court, lacking adversarial proceedings throughout the case, determine the fair value of the case or a circuit court overcome any approval under an abuse of discretion standard. And what Rule 23 constitutional doctrine gives absolute discretion to act on behalf of the class to a mediator.

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[3] Defendants would enjoy the "negative settlement auction" (lowest bidder wins) between Arkansas and New Jersey counsel.

[4] In the KPMG case the Milberg firm and defendants' counsel hired two retired judges to assist them in reaching a settlement. In the *Dusek* and *Thurber* cases the Milberg firm and Wolf Popper, despite representing the same parties, used a mediator to bless their allocation of the settlement funds.

CONCLUSION

For these reasons and those set forth in his original Petition Petitioner respectfully requests that his petition for a writ of certiorari be granted.

Respectfully submitted,

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November 17, 2005

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